Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ROBERT S. CAPUTO,

Appellant

Versus

COMPUCHEM LABORATORIES, INC.,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT AN EMPLOYEE WHO IS SUBJECTED TO A MANDATORY DRUG TEST HAS A CLAIM AGAINST A PRIVATE LABORATORY IN NEGLIGENCE OR DEFAMATION FOR A FLAGRANT REPORTING ERROR RESULTING IN LOSS OF EMPLOYMENT BECAUSE THE LABORATORY FAILED TO FOLLOW FEDERAL STANDARDS, AND THE LOWER COURT'S DETERMINATION WAS ERRONEOUS IN REJECTING FEDERAL STANDARDS AND IN CONCLUDING THAT DEFENDANT LABORATORY OWED PLAINTIFF/EMPLOYEE NO DUTY IN PERFORMING THE TEST, OR REPORTING THE DRUG TEST RESULTS ACCURATELY?

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT S. CAPUTO

Petitioner

Versus

COMPUCHEM LABORATORIES, INC.

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United states:

The Petitioner, Robert S. Caputo, prays that a writ of Certiorari issue to review the order of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals For the Third Circuit entered August 17, 1994 is unrecorded and appears at page 2a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania entered February 23, 1994 is unrecorded and appears at page 4a of the Appendix herein.

JURISDICTION

The final Order of the Court of Appeals for the Third Circuit is dated August 17, 1994, and this Petition For Writ of Certiorari is filed timely within 90 days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and rule 17 of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

The Medical Review Officer's Guide To

Drug Testing, Crouch, MBA, Caplan Yale; ___CFR_____.

STATEMENT OF THE CASE

On October 26, 1994, Plaintiff/Employee filed this action against Defendant/laboratory seeking damages arising from Defendant's negligence and defamation in the execution and reporting of a drug test Defendant performed for Plaintiff's employer. Defendant moved for summary judgment. On February 23, 1994, the District Court entered an Order granting Defendant's motion. On August 17, 1994, the Court of Appeals for the Third Circuit affirmed the District Court's Order. Plaintiff now petitions this Honorable Court for review of the order affirming the grant of summary judgment.

In April, 1992, Plaintiff was employed by Air Products and Chemicals, Inc. in

Allentown, Pennsylvania. Plaintiff's employer hired Defendant laboratory to run a drug screen on its employees including Plaintiff. Defendant had actual notice and knowledge that Defendant's drug screen was used to terminate employees who tested positive for illegal substances.

Defendant ran a drug screen on Plaintiff, and thereafter reported to Plaintiff's employer on April 16, 1992 that Plaintiff tested "positive" for morphine.

Plaintiff immediately secured an independent laboratory on April 24, 1992 to run the exact same test, and those results were "negative". App. Vol. One, p. 33a. The re-test was to no avail. Plaintiff was terminated because of Defendant's report.

Plaintiff never used or ingested morphine. Defendant does not dispute this fact. Plaintiff only used codeine per

prescription in 1976. Hence, it ought to have been scientifically impossible for Plaintiff to have tested positive for morphine.

Plaintiff's expert, Richard S. Marchese, reviewed the drug screen documents as provided by Defendant. Based upon his review of the documents, and the scientific literature, Marchese, a former Chemistry professor and laboratory director, wrote as follows:

> "The test specimen was reported as opiate positive for Morphine, yet, no analysis for 6 monoacetyl morphine (6-MAM) was performed.
> The test specimen when analyzed twice had a very low morphine concentration of 400-500 ng/ml.
>
> Poppy seeds contain predominately morphine with small amount of codeine present. It is widely known in forensic toxicology circles that ingestion of foods such as poppy seed bagels...can produce morphine levels of at least 1000 ng/ml. Poppy seeds contain more morphine than codeine. Usually codeine concentrations are below 300 ng/ml.

> Federal regulations allow the Medical Records Officer (MRO) to verify the result as positive only if 6-MAM is detected or if the MRO finds clinical evidence in addition to the urine test.
>
> In view of the above discussion, it is this expert's opinion that the reported results by CompuChem for the test specimen is questionable, and therefore, should be reported as negative..."
>
> App. Vol. One, p. 36a

On these facts, Plaintiff submits that: a) the test was improperly analyzed; b) Defendant's own numbers merely suggest an ingestion of poppy seed, not morphine; and c) given the state of scientific knowledge, such results ought to have been submitted as "negative" unless a 6-MAM test was administered. On these facts, the District Court granted Defendant's Motion For Summary Judgment. The Court of Appeals affirmed. Plaintiff respectfully submits this brief in support of Plaintiff's Petition For Writ of Certiorari which is now

before this Honorable Court for disposition.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under rule 17(1)(9) of the Rules of the United States Supreme Court in that a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter as to call for an exercise of this Honorable Court's power of supervision. Compare, Willis v. Roche Biomedical Laboratories, Inc., 1994 WL 194144 (5th Cir, June 6, 1994).

ARGUMENT

I. WHETHER OR NOT AN EMPLOYEE WHO IS SUBJECTED TO A MANDATORY DRUG TEST HAS A CLAIM AGAINST A PRIVATE LABORATORY IN NEGLIGENCE OR DEFAMATION FOR A FLAGRANT REPORTING ERROR RESULTING IN LOSS OF EMPLOYMENT BECAUSE THE LABORATORY FAILED TO FOLLOW FEDERAL STANDARDS, AND THE LOWER COURT'S DETERMINATION WAS ERRONEOUS IN REJECTING FEDERAL STANDARDS AND IN CONCLUDING THAT DEFENDANT LABORATORY OWED PLAINTIFF/EMPLOYEE NO DUTY IN PERFORMING THE TEST, OR REPORTING THE DRUG TEST RESULTS ACCURATELY?

1. Genuine issues of material fact preclude summary judgment. This Honorable Court's review of entry of summary judgment is plenary. This Honorable Court must apply the same standard as the District Court. F.R.C.P. 56(c); Godman v. Mead Johnson & Co., 534 F.2d 566 (3d Cir, 1976), cert denied, 429 U.S. 1038 (1977); Bank of Commerce v. City National Bank, 484 F.2d 284 (5th Cir), cert denied, 416 U.S. 905 (1973). Thus, this Honorable Court undertakes an independent review of the record, viewing that record in the light most favorable to the party opposing the motion. Ransburg Elector Coating Corp. v. Lansdale Finishers, Inc., 484 F.2d 1037 (3d Cir, 1973).

Federal Rule of Civil Procedure 56(c) states that summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is

entitled to judgment as a matter of law. Small v. Seldows Stationary, 617 F.2d 922 (3d Cir, 1980). The court does not decide issues of fact, but simply determines if there is an issue of fact to be tried. Ettinger v. Johnson, 556 F.2d 692 (3d Cir, 1977). The facts must be viewed in the light most favorable to the opposing party, and any reasonable doubt as to the existence of genuine issues of fact is to be resolved against the moving parties. Continental Insurance Company v. Bodre, 682 F.2d 436 (3d Cir, 1982). Applying this standard to the case at bar, Defendant's motion ought to have been denied.

2. Defendant owed Plaintiff a duty of due care to properly perform and report Plaintiff's urinalysis.

Neither Defendant, the trial court, nor the appellate court cited a Pennsylvania case for the proposition that there is

no duty of due care to the employee owed by a laboratory hired by an employer to test an employee's urine. None exists. Instead, basic legal principles dictate that Defendant owed Plaintiff a duty of care.

For purposes of this argument, apparently Defendant conceded the accuracy of Plaintiff's expert's claim that opiates should not be reported as "positive" unless a 6-MAM test is performed. Hence, despite this error, Defendant contends that it is immune from suit in negligence because the duty is solely to the employer, not the employee.

In making this argument, Defendant ignored the decision in Borse v. Piece Goods Shop, Inc., 758 F.Supp. 263 (ED, PA 1991), reversed 963 F.2d 611, (3d Cir, 1992) wherein this Third Circuit held an employee has a right to privacy not to be

subjected to an employer-mandated drug screen. Given this reality, where an employee gives up this important right, the consideration for this right, of necessity, must be the non-negligent performance of the drug screen.

This approach is consistent with the decision in Jevic v. Coca Cola Bottling Co., 118 Lab Case ¶56, 591, 1990 WL 109851 (D, NJ, June 6, 1990):

> "...The essence of a cause of action in negligence is the breach of a legal duty. That legal duty may be defined by statute or the common law.
>
> * * *
>
> ...[The prospective employer] has a definite obligation, as a matter of public policy, to insure that its drug testing procedures are scientifically sound...A contrary holding would invite the use of suspect procedures and techniques that could easily be skewed to mask other impermissible hiring policies."
>
> Jevic v. Coca Cola Bottling Co. of New York, Inc. 1990 WL 109851 at 6-7 (citations omitted).

App. Vol. 4, p. 252a

The combined impact of Borse v. Piece

Goods Shop, Inc., supra, and Jevic v. Coca Cola Bottling Co. of N.Y., supra, is to require that a laboratory hired by an employer to test an employee's urine for drugs--knowing that a "positive" report will result in the employee's termination--owes the employee a duty of due care to perform the test non-negligently. No one disputes that this was not done in this case. Hence, Defendant's Motion for summary judgment ought to have been denied.

Pennsylvania has adopted a very traditional concept of duty namely, tort law is predicated on social policy that protects a plaintiff as a member of a class to whom a duty is owed consistent with the person's interest to be free from unreasonable risk of injury. Hahn v. Atlantic Richfield, 625 F.2d 1095 (3d Cir, 1980), cert denied, 450 U.S. 981 (1980). Pennsyl-

vania has specifically adopted the duty concept as explained inSection 323 of Restatement Of Torts, 2nd, regarding the negligent undertaking to render services which impacts on another. See, Morena v. South Hills Health Systems, 501 Pa. 634, 462 A.2d 680 (1983); Feld v. Merriam, 506 Pa. 383, 485 A.2d 742 (1984). Hence, there was clearly a legal duty imposed under Restatement Torts, 2nd, Section 323.

Pursuant to these interrelated factors of consideration, Defendant/drug tester owes a duty of reasonable care to Plaintiff whose bodily fluids are assayed for traces of illegal drugs. Hence, the lower court's holding that Defendant owed Plaintiff no duty ought to be reversed.

3. The lower courts erred as a matter of law in rejecting Federal standards and concluding that Defendant owed no duty to

Plaintiff. Federal standards require Defendant to perform a verified test (6-MAM when low level of opiates occurs in Plaintiff's urine. Expert report of Richard S. Marchese, infra.

Changing social conditions lead constantly to the recognition of new duties. If Defendant even partially has created the danger in issue, then Defendant has an affirmative duty.

Defendant is not merely an innocent bystander, but rather, it partially created a dangerous situation. As information services become more prevalent in our society, the information providers should be held accountable for the information they provide. See, e.g., Willis v. Roche Biomedical Laboratories, Inc., 1994 WL 194144 (5th Cir, June6, 1994). Such information should be complete and not misleading.

For years, credit reporting agencies have been held to the exercise of due care in securing and distributing information concerning the financial standing of individuals, firms and corporations. See, Fair Credit Reporting Act, U.S.C. §1681 et seq.

The potential problems of credit reports containing errors due to negligence are obvious in adverse and financial and personal consequences. A laboratory, such as Defendant, conducting drug tests can cause similar or worse damages and injury to its subjects. Defendant, therefore, ought to be held to a reasonable degree of care. In Doe v. Smith, Kline, Beecham Clinical Laboratories, Inc., 855 SW.2d 248 (Tex App. 1993), the court explained:

> "...it is foreseeable that employers would interpret a raw result showing a positive opiate test result as exclusively indicating illegal or illicit drug use and would not consider the possibility of...anomalies."
> Smith Kline, Id., at 255-256.

The evidence here is undisputed. Plaintiff did not engage in illicit drug use, and Plaintiff's employer terminated Plaintiff due to Defendant's erroneous report. Hence, the case illustrates why laboratories conducting drug tests must be held to a reasonable duty of care. By analogy to existing credit reporting laws, a duty must exist imposing upon defendant/drug testing laboratory duty to exercise reasonable care in the performance and reporting of drug tests. Imposition of a duty is compelling in this case where specific federal standards already exist for such test. Hence, the lower court erred in concluding Defendant owed Plaintiff no duty.

4. <u>The lower courts' holding that Defendant/testing laboratory owes no duty to analyze Plaintiff's bodily fluid in a scientifically reasonable manner consti tutes an abuse of fundamental fairness and</u>

justice. Willis v.Roche Biomedical Laboratories, Inc., supra. Defendant laboratory ought to be held responsible for its conduct as the risk of harm in our society to an individual such as Plaintiff because of a false-positive drug test is so significant that any individual wrongfully accused of drug usage by his employer is properly within the scope of protection under the law. Lewis v. Aluminum Co. of America, 588 So.2d 167 (La.App.[4th Cir] 1991); Nebrenz v. Dunn, 593 S.2d 915 (La.App. [4th Cir], 1992). See, generally, Douglas L. Stanley, Employee Drug Testing, 61 Journal of the Kansas Bar Association, 17 (Jan. 1992) (citing a relevant Journal of the American Medical Association article on the proposition about reliability of drug testing, 258 JAMA 2587-2588 (1987). In sum, under current Pennsylvania law, Defendant owed Plaintiff a duty of reasonable care under

Section 323 of Restatement, Torts, 2nd in conducting tests on Plaintiff's urine for illicit drug use by Plaintiff for use by Plaintiff's employer in decision making relative to Plaintiff's employment. Willis, supra.

5. Defendant breached its duty of care owed to Plaintiff. Plaintiff's expert, Richard S. Marchese, reviewed the drug screen documents as provided by Defendant. Based upon his review of the documents, and the scientific literature, Marchese, a former Chemistry professor and laboratory director, wrote as follows:

> "The test specimen was reported as opiate positive for Morphine, yet, no analysis for 6 monoacetyl morphine (6-MAM) was performed.
> The test specimen when analyzed twice had a very low morphine concentration of 400-500 ng/ml.
>
> Poppy seeds contain predominately morphine with small amount of codeine present. It is widely known in forensic toxicology circles that ingestion of foods such as poppy seed bagels...can produce morphine levels

of at least 1000 ng/ml. Poppy seeds contain more morphine than codeine. Usually codeine concentrations are below 300 ng/ml.

Federal regulations allow the Medical Records Officer (MRO) to verify the result as positive only if 6-MAM is detected or if the MRO finds clinical evidence in addition to the urine test.

In view of the above discussion, it is this expert's opinion that the reported results by CompuChem for the test specimen is questionable, and therefore, should be reported as negative..."

In addition, it is the accepted practice that each test has only one of three outcomes: negative, verified positive or invalid:

"A laboratory-positive test has a 'negative' outcome if:
1. the MRO determines that the donor's explanation is legitimate; or
2. The result is opiate-positive (and not known positive for 6-MAM), and the MRO finds no clinical evidence of opiate use.
A laboratory-positive test has a 'verified positive' outcome if:
1. The donor provides no explanation for a non-opiate result or provides an explanation that the MRO cannot corroborate; or

2. The result is opiate-positive and the MRO finds clinical evidence of opiate use; or
3. The result is opiate-positive and positive for 6-MAM."

Expert Report of Richard S. Marchese

Using the above expert guidelines derived from Federal standards, Defendant's test of Plaintiff's urine had a "negative" outcome. In technical terms, Plaintiff's outcome was "negative" because the low indication of opiates in the test was not know positive for 6-MAM. Hence, Defendant breached its duty to Plaintiff by reporting a "positive" result when, in fact, Defendant laboratory's test of Plaintiff's urine had a "negative" outcome.

6. The lower court's erred as a matter of law in holding that Defendant accurately reported Plaintiff's test results. Defendant reported to Plaintiff's employer that Plaintiff tested positive for opiates. In fact, the outcome of Plain-

tiff's test was "negative" as explained by Plaintiff's expert above.

Accuracy is the absolute essential ingredient of laboratory analysis. The public perception of scientific measurements is that they are indisputable. If a laboratory reports the presence of a quantity of drug in a specimen, this ruling is judged to be correct, regardless of protestations to the contrary by the subject. Therefore, even if a trace of drug is found, unless that substance is verified (in this case by a 6-MAM as required by law), the test outcome must be reported as "negative". Expert Report of Richard S. Marchese. The lower court erroneously concluded that Defendant properly reported a positive outcome. In this conclusion, the lower court rejected the Federal standards described above.

On these facts, Plaintiff's evidence demon-

strates: a) the test was improperly analyzed; b) Defendant's own numbers merely suggest an ingestion of poppy seed, not morphine; and c) given the state of scientific knowledge, such results ought to have been submitted as "negative" unless a 6-MAM test was administered.

Defendant thus breached its duty of care to Plaintiff proximately causing Plaintiff's termination. Hence, the Order granting summary judgment on Plaintiff's negligence claim ought to be reversed.

4. Plaintiff also established a cause of action based upon defamation. To establish a cause of action for defamation, Plaintiff must establish: "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) a reference to the plaintiff; (4) a recipient's understanding of the communication's defamatory character and its appli-

cation to plaintiff; (5) special harm resulting from the publication; and (6) abuse of any conditional privilege." Smith v. Wagner, 403 Pa. Super 316, 321, 588 A.2d 1308, 1311 (1991); 42 Pa. C.S.§8343(a); Marcone v. Penthouse Int'l Magazine, 754 F.2d 1072, 1077-78 (3d Cir, 1985), cert denied, 474 U.S. 864, 106 S.Ct. 182, 88 L.Ed.2d 151 (1985).

A libel is a publication expressed in writing which tends to blacken a person's reputation and expose him to public hatred, contempt, or ridicule or injure him in his business, trade or profession. Sarke v. Warner-West Corp., 349 Pa. 365, 37 A.2d 444 (1947); Volominov v. Messenger Publishing Co, 410 Pa. 611, 189 A.2d 873 (1963); Cosgrove Studio and Camera Shop, Inc. v. Pane, 408 Pa. 314, 182 A.2d 751 (1962).

The question of whether the language used in the alleged defamatory writing can

fairly and reasonably be construed to have the libelous meaning ascribed to it by Plaintiff is in the first instance a matter of law for the court. Mengel v. Reading Eagle Co., 241 Pa. 367, 99 A. 660 (1906); McDonald v. Lee, 246 Pa. 253, 92 A. 135 25 (1910); Volominov v. Messenger Publishing Co., supra; Cosgrove Studio and Camera Shop, Inc. v. Pane, supra.

A. Defendant's publication is capable of defamatory meaning. In Pirl v. Phila. Elect. Co., 402 Pa. 297, 167 A.2d 472 (1960), the Supreme Court of Pennsylvania unanimously cited with approval the appropriate test set forth in Restatement, Torts §559, namely "a communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

In the instant case, the false positive report clearly imputed drug abuse to Plaintiff. Certainly to charge an employee with a positive result for morphine lowers the employee's esteem in the business and wider community. In fact, Plaintiff's employer fired Plaintiff solely based upon the report. Hence, as a matter of law, Defendant's publication is capable of defamatory meaning. See, also, Restatement, Torts §614(i); Bogash v. Elkins, 405 Pa. 437, 176 A.2d 677 (1979).

Defendant may defend a defamatory claim by proving the truth of the defamatory statement. The District Court seemed to indicate that Defendant prevailed on this defense as a matter of law. e.g., U.S. District Court Opinion, App. Vol. One, 13a-14a.

As set forth above, Defendant's report of drug test results was capable of defama-

tory meaning. Defendant's intentional or negligent failure to establish an appropriate baseline number for morphine inevitably creates false positive readings pertaining to the use of morphine. As explained above, Federal guidelines required that Plaintiff's test be reported as "negative". Defendant is in the business of providing laboratory results to employers concerning drug use by employees. At all relevant times, it had actual knowledge that employer used Defendant's test results to terminate employees based upon drug use. By falsely reporting a "positive" test result, Defendant knowingly reported to Plaintiff's employer that Plaintiff had used morphine. In fact, reasonably, commonly known and used federally required laboratory procedures indicate that Plaintiff's test properly should have been reported as negative. Failure to do so was

not only negligent, but defamatory. Hence, Defendant's motion for summary judgment ought to have been denied.

B. Defendant had no privilege to report the false "positive" results to Plaintiff's employer. As indicated in Baird v. Dun and Bradstreet, 446 Pa. 266, 285 A.2d 166, 171 (1971), the essence of a "conditional privilege" is "...based upon reasonable and probable cause." Compare, Pino v. Prudential Insurance Co., 689 F.Supp. 1368 (ED, Pa, 1980).

In the case at bar, the scientific evidence is uncontradicted. Ingestion of poppy seeds can result in a false "positive". Because of this scientific reality, the test should not be reported as positive given the low numbers in the Plaintiff's test unless the 6-MAM test is administered. It was not.

As a matter of law, should not have

found that the action of the Defendant in reporting this result as positive was "...in a proper manner and based upon reasonable and probable cause." The opposite is the case. A non-negligent laboratory would either have reported this particular test result as "negative" or administered the 6-MAM test prior to reaching a conclusion that it was positive. Thus, the defense of conditional privilege cannot prevail as a matter of law, and Plaintiff's evidence indicates that the conditional privilege was abused. Hence, Defendant's motion for summary judgment ought to have been denied.

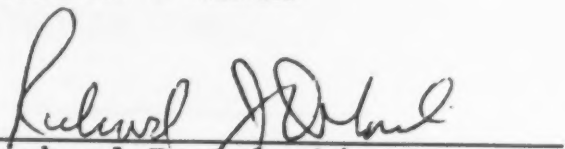
C. Plaintiff is entitled to general damages for loss of personal and business reputation even without averments or proof of special damages. Where, as here, Defendant's publication itself is defamatory and imports the serious sense

attributed to them, proof of special damages is not necessary. See, McIntrage v. Weinert, 195 Pa. 52, 45 A. 666 (1900); Montgomery v. Dennison, 363 Pa. 255, 69 A.2d 529 (1949). Here, Plaintiff also proved special damages arising from his termination. Plaintiff, however, stated a valid claim without such proof. Id. Hence, the order granting summary judgment on Plaintiff's defamation claim ought to be reversed.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari ought to be granted.

Respectfully submitted,
ORLOSKI & HINGA



Richard J. Orloski,
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 94-1372

ROBERT S. CAPUTO,
Appellant

v.

COMPUCHEM LABORATORIES, INC.,

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civ. No. 92-CV-6123)
District Judge; Honorable E. Mac Troutman

Submitted pursuant to Third Circuit LAR 34.1(a)
August 10, 1994

Before; MANSMANN, COWEN and MCKEE, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgment

of the district court dated February 18, 1994, be and is hereby affirmed substantially for the reasons set forth in the district court's opinion.

Costs taxed against the appellant.

BY THE COURT:

Circuit Judge

Dated Aug. 17, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT S. CAPUTO Plaintiff	:	CIVIL ACTION
	:	NO. 92-6123
vs.	:	
COMPUCHEM LABORATORIES, INC. Defendant	:	

TROUTMAN, S.J.

FILED Feb. 23, 1994

O R D E R

and now, this 18th day of February, 1994, upon consideration of Defendant Compuchem Laboratories, Inc's Motion for Summary Judgment, (Doc. #5), plaintiff's response thereto, and upon hearing oral argument, **IT IS HEREBY ORDERED** that the motion is **GRANTED.**

IT IS FURTHER ORDERED that judgment is entered in favor of the defendant and against the plaintiff.

E. Mac Troutman S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT S. CAPUTO Plaintiff	:	CIVIL ACTION
	:	NO. 92-6123
vs.	:	
COMPUCHEM LABORATORIES, INC. Defendant	:	

M E M O R A N D U M

In April, 1992, plaintiff in this action was offered employment at Air Products and Chemicals, Inc., Allentown, Pennsylvania, subject to passing a drug screening test. Plaintiff consented to the test and provided a urine sample which was sent to the defendant laboratory for analysis. In a report dated April 11, 1992, defendant transmitted to Air Products plaintiff's tests results, which indicated the presence of morphine in the sample. Within a few days of receiving the report, Air Products terminated plaintiff's employment.

Contending that he had never abused

any controlled substance, including morphine, plaintiff here asserts claims for negligence and defamation against defendant Compuchem Laboratories based upon his loss of the employment opportunity at Air Products due to the allegedly false and defamatory report submitted by defendant.

Although, as noted in defendant's pending motion for summary judgment, there is no real dispute that the report by the defendant was accurate in the sense that the test did show evidence of morphine, plaintiff nevertheless contends that because the indication of morphine was so weak, defendant should have reported the test result as negative absent an additional and more sophisticated test, which defendant did not use. Plaintiff further contends that federal regulations mandate the additional test, called a 6-MAM, and that when plaintiff was again tested in

April, 1992, by an independent laboratory, the result was reported as negative.[1]

Thus, the instant dispute centers on how the numerical results obtained from the standard and usual drug test used by both the defendant and still another independent laboratory, which later repeated the test on the same specimen and obtained the same numerical values, should have been reported. Since there is no dispute as to what the numbers actually were, the only question in this action is whether those numbers were appropriately interpreted by the defendant and appropriately reported as a positive drug test result.

1.The negative test to which plaintiff refers was performed several days later in April, 1992, and was not conducted on the same specimen used in the initial test by defendant. A still later test performed on the original specimen by an independent laboratory confirmed the results of the Compuchem tests. (See, Defendant's Motion for Summary Judgment, Doc. #5, Exh. A-24--A-26).

The basis for plaintiff's contentions concerning the allegedly inaccurate reporting of test results which, admittedly, did indicate the presence of morphine, is the fact that common foods, such as poppy seed rolls, ingested prior to a drug test can cause some level of morphine to appear and that such level can even exceed the amount which defendant reported as a positive result of plaintiff's drug test. Hence, plaintiff contends that the additional and more sophisticated test ought to be performed when low numbers, such as those generated by plaintiff's test, are obtained by means of the usual and common test.

In other words, plaintiff is here contending, in effect, that he may have lost his job only because he ate something with poppy seeds in it on the day the employer chose to ask him to submit to a drug test due to the defendant laboratory's

decision to report as a positive result, without further testing, even such a small amount of morphine as could indicate nothing more sinister than an addiction to poppy seed bagels.

Plaintiff asserts that reporting the drug test result as positive was both negligent and defamatory because defendant knew or should have known that the low level indicating of morphine in plaintiff's initial test required independent corroboration before reporting a positive result to the employer, and further, that defendant knew or should have known that such independent corroboration could not be obtained from repeating the same tests as performed the first time, but required the different and more sophisticated test.

Defendant contends that it owed no duty to plaintiff upon which his negligence claim can be based, and that the undisputed

accuracy of the test results eliminates any possibility of a defamation claim. In addition, defendant argues that it properly transmitted the results obtained from plaintiff's test to its client and further contends that there is no evidence of any negligence on the part of defendant in performing the drug test which resulted in plaintiff's termination by his employer. Finally, defendant asserts that there is no factual support for plaintiff's allegations that defendant actually reported that plaintiff failed the drug screening because of codeine abuse or that defendant's report to plaintiff's employer was otherwise false.

Plaintiff appears to be arguing, on the one hand, that defendant's report was false because it implied a judgment that the numerical value obtained via the test indicted substance abuse. In fact, the

record reveals that the report issued to Air Products reported the laboratory's positive screening cutoff numbers for each of a variety of substances, the numerical value obtained from plaintiff's morphine test and the result, positive, obtained by comparing the number found in plaintiff's sample with the positive cutoff value used by the laboratory. (See, Defendant's Motion for Summary Judgment, Doc. #5, Exh. A-3). Since the number found in plaintiff's sample exceeded the minimum baseline value established and used by the laboratory for reporting test results as negative, the report necessarily indicated that plaintiff's test was positive for the presence of morphine. No additional meaning, such as a possible reason for such result, was ascribed to it by the defendant.

In the alternative, plaintiff appears

to argue either that the defendant chose too low a number for the baseline, positive screening cutoff or that it was required to attempt to determine whether such a low positive result was due to substance abuse or to some other factor by performing an additional,more sophisticated test to assure that plaintiff would not be harmed because of the meaning which might be ascribed to a positive result by his employer. Conspicuously absent from plaintiff's arguments, however, is any basis for imposing such a broad duty upon the defendant.

Plaintiff attempts to support his claims against defendant by means of an expert report by Richard Marchese, a college chemistry instructor, who offered the opinion that a result such as that obtained from plaintiff's test should not have been reported as positive unless "verified" by

means of the 6-MAM test, clinical evidence of opiate use or failure of the subject to offer a legitimate alternative explanation for the positive result. (See, Plaintiff's Answer to Defendant's Motion for Summary Judgment, Doc. #10, Exh. B).

In delineating the steps that should have been taken to verify the positive result, however, the expert is referring to standards imposed by federal regulations, which plaintiff has not established were applicable to defendant's handling of plaintiff's test. Moreover, even if such federal regulations are considered the standard by which drug-testing duties ought to be measured in all instances, the verification of positive test results as described by plaintiff's expert is to be accomplished by a Medical Review Officer (MRO) pursuant to those regulations, not by a testing laboratory. (Id.; Defendant's

Reply Brief in Support of Motion for Summary Judgment, Doc. #11, Exh. B at 11980, 11985-11986, wherein the qualifications and duties of an MRO are described). Plaintiff has made no attempt to demonstrate that the defendant could or should have assumed the function of an MRO with respect to plaintiff's test results.

Indeed, it appears from the record that the test results were received and reviewed by medical personnel at Air Products, since the original Compuchem report was addressed to Dr. Lloyd Tepper and since a nurse identified as Coordinator of the Air Products Health Unit transmitted a request to the defendant to retest the specimen submitted by the plaintiff. (See, Doc. #5, Exh. A-3, A-15). Plaintiff offers no explanation or basis for asserting that liability ought to be imposed upon the defendant for failing to perform the duties

of a Medical Review Officer while exonerating Air Products from any reviewing responsibility imposed by the federal regulations, notwithstanding the fact that his prospective employer apparently employs medical professionals who receive the drug test results.[1]

The Court can find no justification in the factual record or in the law for plaintiff's position that liability for either negligence or defamation can or should be imposed upon the defendant for accurately reporting a "lab positive" drug test without assuring that it was a "verified positive" result, i.e., that the testing laboratory should have fulfilled

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2. Lest plaintiff assume from this passing remark that the Court is suggesting that a cause of action lies against Air Products, we hasten to add that there appears to be no support whatsoever for the proposition that the cited federal regulations apply to any entity

the function of a Medical Review Officer, or for some other reason should have assumed a duty to the plaintiff by notifying its client, Air Products, that the low positive number generated by plaintiff's test could have been attributable to causes other than illicit drug use. Similarly, we likewise find no legal or evidentiary support for plaintiff's implicit alternative theory that defendant had, or should have assumed, a duty to suggest to its client that the more sophisticated 6-MAM test ought to have been performed, or to perform such test on its own initiative.

Plaintiff's position in this case is particularly untenable in light of the unchallenged fact that the report from the defendant laboratory was absolutely accurate and disclosed, only to its client, the actual number obtained from plaintiff's sample for the morphine test, the baseline

used by the lab to determine whether the test result should be reported as positive or negative, and the inescapable conclusion that the comparison of the two numbers indicates a positive result. It is difficult to understand plaintiff's contention that a defamation claim can arise from such circumstances.

Moreover, even if we were to agree that the defendant owed plaintiff some sort of duty to assure that the employer understood that the numerical result was a "weak" positive and, therefore, might not indicate substance abuse, we conclude that the fact that the report was transmitted to an employee at Air Products who bore the title "doctor" discharges any such hypothetical duty in that, as a matter of law, a reasonably prudent testing laboratory could thereby assume that the test results would be appropriately reviewed by

knowledgeable medical personnel.

Although we might speculate that the recipient of the report could fail to appropriately review such test results, there is no basis for imposing upon a laboratory a duty to assure competent medical review of the results it obtains unless it has a contractual duty to do so. Here, however, there is absolutely no evidence to suggest that Air Products, plaintiff's employer and defendant's client, asked for or received an interpretation of the test in terms of whether the results thereof reflected drug use. It is clear from the record that the report transmitted by the defendant reflects nothing more than the obvious statement that the indisputably accurate number obtained from the test for morphine when compared to the baseline used by the laboratory showed a level of metabolite for

morphine which exceeded the cutoff level for a positive result. There is likewise no evidence to suggest that the baseline value used by the laboratory was inappropriate. Indeed, such baseline is the same number mandated by the federal regulations cited and relied upon by plaintiff's expert witness. (See, Doc. #11, Exh. B at 11983).

Although it may be true, as plaintiff asserts, that the increasing use of drug testing for employment purposes raises serious questions concerning the duties owed by entities seeking and using the tests to current or prospective employees subjected thereto, the fact that there are reasons to be concerned about the uses, potential misuses or abuses of drug test results does not justify imposing additional and unprecedented duties upon a laboratory with the sole function of analyzing a sample and returning a report, particularly

when such report is factually accurate.

Since we find no basis in the facts or the law for permitting liability to be imposed upon the defendant in this case, we will grant its motion for summary judgment and enter judgment in favor of defendant in the accompanying order.

Supreme Court, U.S.
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No. 94-853

In The

Supreme Court of the United States

October Term, 1994

ROBERT S. CAPUTO,

Petitioner,

v.

COMPUCHEM LABORATORIES, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTION PRESENTED

Whether, under Pennsylvania law, a laboratory hired by an employer to perform drug screening tests on a urine sample from a prospective employee has satisfied any duty of care owed to the prospective employee and is not subject to liability for defamation where the laboratory has properly handled the sample, carefully performed the requested tests and accurately reported the results to the employer?

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OPINIONS AND JUDGMENTS BELOW

The unpublished judgment order of the United States court of appeals for the Third Circuit affirming the district court's grant of summary judgment for respondent CompuChem Laboratories, Inc. is available at 1994 U.S. App. Lexis 27995 (3d Cir. August 17, 1994) and is reproduced in the appendix attached to the petition (J.A. 2a-3a). The opinion of the United States district court for the Eastern District of Pennsylvania is reported at 9 I.E.R. Cas. (BNA) 546 (E.D.Pa. 1994), is available at 1994 U.S.

Dist. Lexis 2191 (E.D.Pa. Feb. 23, 1994) and is reproduced in the appendix attached to the petition (J.A. 4a-20a).

COUNTERSTATEMENT OF THE CASE

Petitioner Robert S. Caputo sued CompuChem Laboratories, Inc. ("CompuChem")[1] for negligence and defamation based on a drug screening analysis performed by CompuChem on a sample of Mr. Caputo's urine. The court of appeals for the Third Circuit affirmed without opinion the district court's grant of summary judgment against Mr. Caputo's claims that CompuChem performed the test negligently and that CompuChem defamed him by reporting the positive drug test result to petitioner's former employer, Air Products and Chemicals, Inc. ("Air Products").

In February, 1992, Mr. Caputo applied for a position with Air Products and, as part of the application process, consented to a pre-employment drug screening test. (J.A. 5a). Mr. Caputo provided the sample in Pennsylvania, where it was sealed and sent to CompuChem, located in North Carolina. *Id.* CompuChem used widely accepted procedures to perform three separate tests on the Caputo sample: an initial drug screening test using the Enzyme Multiplied Immunoassay Technique ("EMIT") method; a

[1] CompuChem Laboratories, Inc. is an affiliate of Hoffmann-La Roche Inc., whose parent corporation, Roche Holdings, Inc., holds a majority interest. The ultimate parent, Roche Holding Ltd., is publicly traded on the Zurich Stock Exchange. Roche Holding Ltd. is also the ultimate parent of Genentech, Inc., which is publicly traded in the United States.

more precise Gas Chromatography/Mass Spectrometry ("GC/MS") test to confirm the initial positive result; and a re-confirmation test using the GC/MS method to reconfirm the positive result. The results of the three separate urine analyses performed by CompuChem are consistent with each other and with an independent test subsequently performed on the same sample. (J.A. 7a, n.1). The Caputo urine sample consistently tested positive for an opiate, morphine.

In April, 1992, CompuChem reported the results of the tests to their client Air Products. The report listed the drugs for which Mr. Caputo's urine was screened, the cutoff levels used to determine a positive reading and the results for each drug, including the one for which the urine tested positive, morphine. (J.A. 10a-11a). As the district court found, the report stated simply that the urine tested positive for morphine: "the report transmitted by the defendant reflects nothing more than the obvious statement that the indisputably accurate number obtained from the test for morphine when compared to the baseline used by the laboratory showed a level of metabolite for morphine which exceeded the cutoff level for a positive result." (J.A. 18a).[2]

The district court found as an "unchallenged fact that the report from defendant laboratory was absolutely accurate." (J.A. 16a). The court found that "[s]ince the

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[2] At Air Products' request, CompuChem performed a reconfirmation GC/MS test and on April 16, 1992 again reported to Air Products that Mr. Caputo's urine tested positive for morphine.

number found in plaintiff's sample exceeded the minimum baseline value established and used by the laboratory for reporting test results as negative, the report necessarily indicated that plaintiff's test was positive for the presence of morphine." (J.A. 11a).

On or about April 13, 1992, Mr. Caputo reported for work at Air Products and was told that the position was no longer available to him because his urine had not passed the drug screening test. Shortly thereafter, he resumed his previous employment.

The positive results of the three CompuChem drug screening tests were confirmed by an independent laboratory chosen by Mr. Caputo. After initiating this litigation, Mr. Caputo requested that his original sample be retested by SmithKline Beecham Laboratories. As the district court found, SmithKline "confirmed the results of the CompuChem tests." (J.A. 7a, n.1).

Mr. Caputo's expert, Richard S. Marchese, stated in his report that the cut-off for a positive reading for morphine was 300 ng/ml and that the Caputo sample analyzed by CompuChem had a "morphine concentration of 400-500 ng/ml." Petition at 5; *see also* J.A. 19a (district court noted widespread acceptance of baseline for positive morphine reading used by CompuChem). Since the reading for the Caputo sample was in excess of 300 ng/ml, the positive cut-off level acknowledged by Mr. Caputo's expert, the district court found "the inescapable conclusion that the comparison of the two numbers indicates a positive result." (J.A. 17a). The facts of record are undisputed that the original Caputo sample tested positive for morphine.

REASONS FOR DENYING THE PETITION

Petition for certiorari should be denied in this case because no federal issue is presented for review. Contrary to petitioner's claim, there is no conflict among the circuits because both the decision of the court of appeals for the Third Circuit in this case and the decision of the court of appeals for the Fifth Circuit in *Willis v. Roche Biomedical Laboratories, Inc.*, 21 F.3d 1368 (5th Cir. 1994) are based on state law, the law of Pennsylvania and Texas, respectively.

Rule 15.1 of the Rules of the Supreme Court of the United States provides that, in addition to arguments for denial of the petition, a brief in opposition to a petition for certiorari should address "misstatements of fact or law" set forth in the petition. In his petition, Mr. Caputo repeatedly mischaracterizes the record in this case.

A. Certiorari Should Not Be Granted Because There Is No Conflict Among The Federal Circuit Courts Of Appeals.

Mr. Caputo asserts that certiorari should be granted because "a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal court of appeals on the same matter. . . . " Petition for Writ of Certiorari at 7; *see* Rule 10.1(a). Mr. Caputo claims that the decision of the court of appeals for the Third Circuit in this case is in conflict with the decision of the Fifth Circuit in *Willis*.

Mr. Caputo is wrong. The decisions of the Third Circuit and the Fifth Circuit are not in conflict because they do not apply the same law. In both cases, the legal

disputes are determined by state law. In this case, the district court applied Pennsylvania state law of negligence and defamation and the court of appeals for the Third Circuit affirmed for the reasons stated by the district court. (J.A. 15a-16a; 2a-3a); Petition at 10-11 (admitting dispute governed by Pennsylvania law). The district court held that, under Pennsylvania law, when a laboratory contracts with an employer to perform drug screening tests of potential employees, the duty owed by the laboratory to the potential employee, if any, is fulfilled by accurately performing those chemical tests requested by the employer and by accurately reporting the results to medical personnel located at the employer. (J.A. 15a-16a; 17a-18a). The district court held that Mr. Caputo's defamation claim failed under Pennsylvania law because the CompuChem report was "absolutely accurate." (J.A. 16a).

In *Willis*, however, the court of appeals for the Fifth Circuit applied the law of Texas. *See Willis*, 21 F.3d at 1370 (holding district court "appropriately applied Texas law"). In *Willis*, an employee of a company brought negligence and other state claims against a laboratory hired by the company to analyze urine samples after the laboratory admitted that it had erroneously reported the employee's urine positive for methamphetamines. *Id.* at 1369-70. The court of appeals reversed the district court's grant of summary judgment against the employee because, "under current Texas law," 21 F.3d at 1375, the laboratory's admission of its mistake in the analysis of the urine sample meant that the record "contain[ed] evidence from which a jury could reasonably conclude that

[the lab] was negligent in the manner in which it administered the generally reliable GC/MS drug testing technology relative to Willis's urine sample, and that such negligent application of this test technology proximately caused injury to Willis." *Id.* at 1376.

While the two decisions of the courts of appeals for the Third and Fifth Circuit differ, the difference is attributable to the differences between Pennsylvania and Texas law and to the differing fact patterns of the two cases. No federal issue is implicated by the divergence of Pennsylvania tort law from Texas tort law and certiorari should not be granted to consider such a false conflict. "As to questions controlled by state law . . . conflict among the circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts." *Ruhlin v. New York Life*, 304 U.S. 202, 206 (1938); *see also Wolf v. Weinstein*, 372 U.S. 633, 636 (1963) (dismissing writ as improvidently granted where the controversy "primarily implicates questions of Pennsylvania state law and presents no federal question of substance"); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."). The ability of states to develop their laws independently of one another is a core value of our federalist system. The supervisory authority of this Court properly is invoked to promote uniformity of the federal courts' application of federal law; here, Mr. Caputo's petition for review should be denied because there is no need for uniformity in the federal courts'

application of the laws of different states. *Cf. Griffin v. McCoach*, 313 U.S. 498, 503 (1941) (certiorari granted in diversity case where conflict among the circuits existed on the federal issue of whether a federal court was required to apply the conflict of laws rules of the state where it sits).

B. Petitioner's Misstatements Of The Record Mischaracterize The Issues Which Would Be Before The Court Were Certiorari Granted.

Petitioner's brief is rife with misstatements of the record. For example, CompuChem made no "flagrant reporting errors." Petition at 8. On the contrary, the district court found as an "unchallenged fact that the report from the defendant laboratory was absolutely accurate." (J.A. 16a); *see* J.A. 18a-19a ("the indisputably accurate number obtained from the test for morphine when compared to the baseline used by the laboratory showed a level of metabolite for morphine which exceeded the cutoff level for a positive result"). Petitioner does not dispute the district court's finding that the established cutoff for a positive reading for morphine is 300 ng/ml, *see* J.A. 19a, and that the Caputo sample tested by CompuChem had a "morphine concentration of 400-500 ng/ml," which obviously is higher than the positive cutoff. Petition at 5, 19 (quoting Mr. Caputo's expert report). By conceding these facts alone, Mr. Caputo has conceded the propriety of the district court's finding that the CompuChem test result – positive for morphine – was "absolutely accurate." (J.A. 16a).

Petitioner claims that CompuChem should not have reported the Caputo result as "positive" because the levels of morphine discovered in the Caputo sample are consistent with ingestion of poppy seeds. Contrary to Mr. Caputo's claims, the record shows that this case does not concern a "false positive" test result, *see* Petition at 6, 18, 26, nor does it involve poppy seeds. *Id.* at 6, 19-21, 28.

While it may be true that the ingestion of poppy seeds can cause the presence of morphine in urine, the record contains no evidence that Mr. Caputo ingested poppy seeds prior to providing the urine sample analyzed by CompuChem. Mr. Caputo's expert's ruminations on the possible effects of poppy seeds therefore are irrelevant to this lawsuit. Moreover, it is undisputed that poppy seeds do not cause "false positive" drug test results. Mr. Caputo's own expert states that it is "widely known" that ingestion of poppy seeds "can produce morphine" in urine because poppy seeds contain "predominantly morphine." Petition at 19-20. A laboratory test for morphine detects morphine no matter why it is present. Urine which contains more than the positive cutoff level for morphine has in fact tested positive for morphine and should be so reported. Mr. Caputo has never denied that his urine sample had a higher concentration of morphine than the positive cutoff level of 300 ng/ml. No matter what the source of the morphine in Mr. Caputo's urine, CompuChem was obligated to report the result as positive.

Most importantly, in an apparent attempt to create a federal issue where there is none, petitioner has improperly relied on certain federal guidelines governing the conduct of a Medical Review Officer ("MRO"), defined in

the guidelines as a licensed physician who interprets the results of laboratory tests performed for federal workplace drug testing programs. Mr. Caputo has distorted the content of the federal guidelines, misstated his own expert's interpretation of the guidelines and failed to provide any evidence that federal regulations of any kind applied to CompuChem's testing of the urine sample provided by Mr. Caputo.

Mr. Caputo has cited no evidence to support his claim that the district court erred in determining that this case is not subject to any federal guidelines. *See* Petition at 8; J.A. 13a (Mr. Caputo "has not established" applicability of federal regulations); J.A. 15a, n.2 ("there appears to be no support whatsoever for the proposition that the cited federal regulations apply"). Nevertheless, the text of the Guidelines upon which Mr. Caputo relies[3] is useful to illustrate that petitioner has confused the role of a laboratory with that of an MRO.

The text of the Guidelines reveal that the role of the laboratory is to answer the question "are drugs present in the urine?" If the test is positive, the role of the Medical Review Officer is to answer the question why drugs are present in the urine. Under the Guidelines, the Medical

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[3] Under "Federal Provisions Involved," petitioner has listed "The Medical Review Officer's Guide to Drug Testing, Crouch, MBA, Caplan Yale; ___ CFR ___." Petition at 2-3. Mr. Caputo apparently refers to the United States Department of Health and Human Services rules which explain how a Medical Review Officer is to evaluate urine drug tests performed in federal workplaces. *See* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11979, 11985-986 at §§ 2.7 (a-d).

Review Officer is responsible for "verifying" a confirmed positive test result, meaning the MRO must determine whether a positive drug test of an individual's urine is attributable to drug use by that individual:

> (a) Medical Review Officer Shall Review Results. An essential part of the drug testing program is the final review of results. A positive test result does not automatically identify an employee/applicant as an illegal drug user. An individual with a detailed knowledge of possible alternate medical explanations is essential to the review of results. This review shall be performed by the Medical Review Officer . . .
>
> (b) . . . The Medical Review Officer shall be a licensed physician with knowledge of substance abuse disorders and may be an agency or contract employee. *The role of the Medical Review Officer is to review and interpret positive test results* . . . The Medical Review Officer *shall examine alternate medical explanations for any positive test result* [which may include an interview of the person and review of his or her medical history or other relevant biomedical information].

53 Fed. Reg. 11985 §§ 2.7(a-b) ("Reporting and Review of Results") (emphasis added). The laboratory's function is limited to the scientific task of determining whether a urine sample contains drugs; the MRO decides how to interpret and act on a laboratory positive result.

Mr. Caputo claims that CompuChem Laboratories should not have reported the Caputo sample as positive for morphine without first "verifying" the results by performing an additional test called 6-MAM. *See e.g.*, Petition

at 8, 14-15, 20-21, 21-23, 27. On the contrary, the record shows that the 6-MAM test was not required. Petitioner's claim rests on his misinterpretation of his own expert's report, his unsupported assertion that federal guidelines apply and his misstatement of the role of a laboratory as opposed to an MRO.

Petitioner has confused a "laboratory-positive" result with a "verified positive" result. Mr. Caputo's expert states that CompuChem did not perform a 6-MAM test and that certain unspecified federal guidelines:

> allow the Medical Records [sic] Officer (MRO) to verify the [laboratory-positive] result as positive only if 6-MAM is detected or if the MRO finds clinical evidence in addition to the urine test.

Petition at 20 (quoting expert report). Mr. Caputo's expert does not state that a laboratory *must* perform a 6-MAM test to reach a laboratory-positive result for morphine nor does he claim that a laboratory's omission of a 6-MAM test is evidence of negligence. Rather, the expert states that, under certain federal regulations, the detection of 6-MAM is an alternative way for a Medical Review Officer to verify a laboratory-positive urine test. *Id.* As CompuChem is a laboratory and not a "Medical Review Officer," petitioner's expert's views on what an MRO is and is not permitted to do are not relevant to this litigation. *See* J.A. 13a (district court finding that even if federal rules applied, "the verification of positive test results as described by plaintiff's expert is to be accomplished by [an MRO], not by a testing laboratory").

Mr. Caputo's claim that CompuChem should have performed the 6-MAM test is unsupported by his own

expert's report or any other evidence of record. CompuChem's customer did not request the 6-MAM test and Mr. Caputo has not pointed to any evidence to contradict the district court's finding that performance of the 6-MAM test was not otherwise required. As the district court found, there is

> no justification in the factual record or in the law for plaintiff's position that liability for either negligence or defamation can or should be imposed upon [CompuChem] for accurately reporting a 'lab positive' drug test without assuring that it was a 'verified positive' result, *i.e.*, that the testing laboratory should have fulfilled the function of a Medical Review Officer . . . or should have . . . suggest[ed] to its client that the more sophisticated 6-MAM test ought to have been performed or . . . perform[ed] such test on its own initiative.

J.A. 15a-16a.

In addition to petitioner's above misstatements of the factual record, Mr. Caputo has failed to set forth any evidence that CompuChem knew for what purpose petitioner's employer would use the results of the drug test. Petition at 4. Nor has Mr. Caputo identified any evidence to support his claim that CompuChem "failed to establish an appropriate baseline number for morphine." Petition at 27. On the contrary, the district court found "no evidence to suggest that the baseline value used by the laboratory was inappropriate" and that Mr. Caputo's own expert relied on the same number (300 ng/ml) to distinguish a positive from a negative test result. (J.A. 19a).

CONCLUSION

Mr. Caputo's petition for certiorari should be denied. The decision of the court of appeals for the Third Circuit in this case and the decision of the court of appeals for the Fifth Circuit in *Willis* are not in conflict because the decisions applied the laws of Pennsylvania and Texas, respectively, and no federal issue is presented for review.

Respectfully submitted,

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